

1 UNITED STATES COURT OF FEDERAL CLAIMS

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4 CGI FEDERAL, INC.,)
5 Plaintiff,) Case No.
6 vs.) 14-355C
7 THE UNITED STATES OF AMERICA,)
8 Defendant.)

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12 Suite 612
13 Howard T. Markey National Courts Building
14 717 Madison Place, N.W.
15 Washington, D.C.
16 Friday, May 1, 2015
17 11:00 a.m.
18 Telephonic Status Conference

19

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21 BEFORE: THE HONORABLE MARY ELLEN COSTER WILLIAMS

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25 Elizabeth M. Farrell, Digital Transcriber

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1 APPEARANCES:

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22 ALSO PRESENT:

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1 P R O C E E D I N G S

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3 (Proceedings called to order, 11:09 a.m.)

4 THE COURT: -- Inc. vs. United States, Number 14-
5 355C. I'm Judge Williams. Let me ask counsel to please
6 identify themselves for the record.

7 MR. MCCALED: For Plaintiff, CGI, it's Scott
8 McCaleb from Wiley Rein, and with me is Dan Graham and Gary
9 Ward, both from Wiley Rein.

10 THE COURT: Good morning.

11 MR. MCCALED: Good morning, Your Honor.

12 THE COURT: And for the Government?

13 MR. RAYEL: This is William Rayel with the
14 Department of Justice, and on another line is Jeffri Pierre
15 from Health and Human Services.

16 THE COURT: Thank you and welcome.

17 MS. PIERRE: Good morning.

18 THE COURT: Good morning. So, what I'd like to try
19 to figure out is what do we agree on here. Mr. McCaleb, what
20 -- at least what terms do you think of this injunction can
21 you both live with and then we'll talk about what you
22 disagree on.

23 MR. MCCALED: I think that we can live with the
24 enjoinder or the injunction of placing orders against the
25 existing RFQs and I think, from there, we depart on the until

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1 language. Until what? So, we agree that the Defendant can
2 be enjoined from placing orders or awarding contracts under
3 the existing RFQs, and then I think after that, that's where
4 we depart, what next.

5 THE COURT: And the Plaintiff, just to recap?

6 MR. MCCALED: Yeah, what we would say is that the
7 Court should enjoin the Government from proceeding with award
8 under the existing RFQs and -- so, that's just -- that's one
9 injunction. And then the additional order would be that the
10 Government have to provide all prospective offerors,
11 including CGI, a reasonable opportunity to submit quotes in
12 response to any new or amended RFQs that the Defendant wants
13 to proceed with.

14 We had suggested 21 calendar days as a reasonable
15 opportunity to respond to any new or amended solicitation.
16 The basis for that, Your Honor, was that that was the amount
17 of time that CMS gave in their initial RFQ. When they
18 initially released it, they said you have 21 days to respond.
19 So, we were just using the number of days that CMS itself had
20 used.

21 THE COURT: Okay. That's not necessarily something
22 that Courts typically get into, however, right?

23 MR. MCCALED: Yes, Your Honor. I guess it's --
24 we're in one of these precarious situations where we --
25 we're of the view that every time we give an inch, you know,

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1 the Government takes a yard. And, so, the more clarity that
2 could be given here, we think the better. I recognize that
3 it is probably not the norm that you would identify a number
4 of days.

5 THE COURT: Okay. Mr. Rayel, do you have any
6 problem if we get rid of the number of days to having the
7 injunction have the two parts that Mr. McCaleb just
8 articulated?

9 MR. RAYEL: Yes, Your Honor, absolutely we do, as
10 set forth in our reply to their response to our status report
11 that we filed yesterday. What the injunction should do here
12 is it should basically fix the problem that the Federal
13 Circuit addressed, which is that the agency did not comply
14 with FAR Part 12.

15 So, the injunction should enjoin the award of the
16 RFQs at issue until CMS complies with Part 12 of the Federal
17 Acquisition Regulation and all the various possibilities that
18 that could entail. It could possibly entail the agency, you
19 know, obtaining a waiver and not amending the payment terms.
20 You know, perhaps they'll need to do an addendum pursuant to
21 12.302(d). I don't know. But that's part of FAR Part 12. I
22 mean, ultimately, the agency shall retain the discretion to
23 do what it can under the law. And, so, we don't believe that
24 an injunction going further than what we proposed in our
25 reply brief would go beyond the Federal Circuit's decision

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1 and interfere with the agency's lawful discretion.

2 THE COURT: Okay. So, I want to just pound on what
3 we've got on the table. So, number one, enjoin Defendant
4 from placing orders against existing RFQs absent a waiver.
5 Does that solve it?

6 MR. RAYEL: Oh, no, until CMS complies with Part 12
7 of the Federal Acquisition Regulation with regard to the
8 payment terms. CMS is required to comply with Part 12. So,
9 that's just --

10 THE COURT: Well, of course they are, but that's --
11 I'm just talking about the injunction.

12 MR. RAYEL: Right, Your Honor. And what -- what
13 Plaintiff wants to do is limit -- limit the various things
14 that CMS can do. And what we're saying is that CMS should
15 retain its lawful discretion to do -- to do whatever it wants
16 within the bounds of the law. The Court doesn't need to make
17 any decision about what the outer limits of those bounds are
18 at this time. It could simply issue an injunction fixing the
19 problem the Federal Circuit found, which is you need to
20 comply with FAR Part 12. That is the injunction we propose.

21 MR. MCCALED: Your Honor, we'd love to respond to
22 that.

23 THE COURT: Well, you may, just a minute. I want
24 to look at his papers to see exactly what he's talking about.
25 Okay, ordered that the Defendant, da, da, da -- okay, so, Mr.

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1 McCaleb, you don't -- that doesn't do it for you?

2 MR. MCCALED: It absolutely does not, especially
3 with the explanation that the Government has given as to what
4 they want to do and are proposing to potentially do. What
5 they're basically saying is that there should be no
6 preclusive effect to what has happened in the last year and a
7 half of litigation and hundreds of thousands of dollars that
8 my client has spent trying to vindicate its rights. Even
9 where we're talking about the exact same procurement by the
10 exact same agency for the exact same services under the exact
11 same solicitations, which they want to proceed under, in
12 analyzing the exact same quotes that they've been evaluating
13 for the last year. That's not what the law permits.

14 They've said in their papers what they want to be
15 able to do, they want to go back and -- they are in the midst
16 of doing market research and the market research they say is
17 for two purposes. And they said one is to go back and make a
18 new determination based on market research that the terms are
19 consistent with customary commercial practice. Well, that's
20 not true. That's what we -- that is what we've thought for
21 more than a year to say that they -- that did not exist.

22 The terms are not consistent with customary
23 commercial practice. This Court found that, the Federal
24 Circuit agreed and CMS does not now get a do-over to go try
25 and say, oh, these terms are, in fact, consistent with

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1 customary commercial practice. We had to put in -- the Court
2 told us to and we did and we did the same thing at GAO. We
3 put in two declarations establishing that they're
4 inconsistent with customary commercial practice and now
5 they're trying to say, oh, well, we're going to go back and
6 check again.

7 Well, Note 5 of the Federal Circuit's decision
8 expressly says DOJ waives their right to contest it and says
9 the Government, in response to oral argument questions
10 indicated that the Court of Federal Claims, you, Your Honor,
11 was without authority to find that the revised payment terms
12 were inconsistent with customary commercial practice. We
13 deem this issue waived by the Government.

14 THE COURT: Mm-hmm.

15 MR. MCCALED: And, indeed, if we need any further
16 indication of the Federal Circuit's view on it, you can look
17 at the transcript where Judge Moore, at page 35 of the
18 transcript, says I don't understand why that ship hasn't
19 sailed. You had a chance throughout this litigation to
20 clearly put this in issue. You chose not to dispute it. I
21 don't understand what set of circumstances on remand allows
22 you to reopen that issue, take it back to the agency and
23 allow them to potentially proffer an argument about what --
24 whether it is or isn't customary.

25 Judge Taranto said the same thing effectively. He

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1 said these terms have definitively and finally and
2 preclusively been determined to be contrary to commercial --
3 customary commercial practice. The fact that we're having to
4 spend additional money dealing with this issue is
5 particularly disappointed. The Justice Department could have
6 sought to overturn the Federal Circuit's ruling on this and
7 they didn't and my client should not be forced to continue to
8 have to respond to the Government's -- you know, their
9 arguments here.

10 The second thing they --

11 THE COURT: Okay, before we go to the second thing.

12 MR. MCCALED: Yes, Your Honor.

13 THE COURT: So, Mr. McCaleb, does this Court, the
14 trial court have the authority to order the Government to
15 stop doing the market research to make a new determination
16 that the terms are consistent?

17 MR. MCCALED: We have -- we don't have any problem
18 with them doing market research if they want to do it, but
19 they can't -- they can't do it for the purpose of trying to
20 establish that the terms are consistent with customary
21 commercial practice.

22 THE COURT: Okay.

23 MR. RAYEL: Your Honor, this is Mr. Rayel. The FAR
24 says that the agency has to do market research to determine
25 what the customary commercial practices are. The agency is

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1 following the FAR. I mean, the idea -- the trial court --
2 the Court made a determination that the terms were
3 inconsistent with customary commercial practice for purposes
4 of this litigation. The agency had not analyzed that issue.
5 It had not done the market research. And our position, of
6 course, was that it wasn't required to. The Federal Circuit
7 disagreed with that position. The Federal Circuit found that
8 we are required to comply with Part 12. So, now, the agency
9 is complying with -- trying to comply with Part 12 in doing
10 that market research.

11 It is possible -- possible, I'm not saying this
12 will happen, it's possible that the market research in full
13 might show that the agency's payment terms are consistent
14 with customary commercial practice.

15 THE COURT: But wait a minute, Mr. Rayel. The
16 Federal Circuit held that they're not and that you waived the
17 opportunity to challenge that.

18 MR. RAYEL: The Federal Circuit held that we waived
19 the opportunity to challenge that they were inconsistent with
20 customary commercial practice.

21 THE COURT: Correct. So, what the heck are you
22 doing commercial --

23 MR. RAYEL: This is (inaudible) litigation. This
24 would be -- if -- this is a big if, hypothetical. But if the
25 -- if CMS were to do the market research that it's doing and

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1 determine -- and the market research led to the conclusion
2 that their payment terms are, in fact, consistent with
3 customary commercial practice, that would be an entirely new
4 lawsuit, a separate issue. It would not be the identical
5 issue that was decided here in this Court. The question
6 would be, did the agency make a rational determination based
7 on adequate market research that the terms are consistent
8 with customary commercial practice? That issue has not been
9 decided by any court. Of course, it couldn't have been
10 because the agency has made no such determination.

11 THE COURT: Well, I think that that would be
12 contrary to the Federal Circuit's holding.

13 MR. RAYEL: And that's an issue -- and I'm sure CGI
14 will argue that in the case if the agency, in fact, made such
15 a determination. But that's ultimately -- that's ultimately
16 an issue for another case. We've laid out in Number 5 why we
17 don't think collateral estoppel would apply for several
18 reasons, including the fact that the issue hasn't been
19 actually litigated because we never disputed that the terms
20 were not consistent with customary commercial practice.

21 THE COURT: Well, if you concede the point, it's
22 been litigated.

23 MR. RAYEL: No, no, it hasn't, Your Honor. That's
24 not what the law says. And it's -- we don't need to decide
25 this issue now. This can be decided in another case if the

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1 agency makes that determination.

2 THE COURT: Well, you could have litigated it.

3 MR. RAYEL: We -- what we could have argued is that
4 the -- is that CGI was not prejudiced by the fact that we
5 failed to comply with Part 12 because the terms are, in fact,
6 consistent with customary commercial practice. We didn't
7 have market research to support that because the agency
8 didn't do the market research because it wasn't required to
9 follow Part -- it didn't believe it was required to follow
10 Part 12, a view that both this Court and the GAO agreed with.
11 The Federal Circuit had disagreed so now the agency needs to
12 go back and follow Part 12.

13 Part of Part 12 is being able to make the
14 determination the terms are -- based on market research, the
15 terms are -- based on market research, the terms are
16 consistent with customary commercial practice. If the agency
17 made that determination --

18 THE COURT: Right.

19 MR. RAYEL: -- there would be a rationale basis --
20 there would -- CGI could challenge the rationality of that
21 determination. That issue has not been before any court.

22 MR. MCCAULEB: Your Honor, with all due respect, the
23 issue of whether these terms have been before a court, that
24 is exactly what we litigated. Are these terms, which are
25 mandating a belt and suspenders approach and requiring RACs

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1 to wait three to ten times longer to get paid, we -- that's
2 exactly what we litigated and -- and the Federal Circuit's
3 Shell Petroleum case says, look, when one party introduces
4 evidence on a dispositive issue of fact and an adverse party
5 with an opportunity and motive to contest the presentation
6 chooses not to, the ensuing finding is entitled to the same
7 respect as one litigated to the hilt. This is -- this has
8 been decided.

9 And for the Government to be here now saying, oh,
10 we're going to -- a year and a half later, hundreds of
11 thousands dollars later and suggests that, oh, we're going to
12 go check now and see whether these terms are consistent with
13 customary practice, that's nonsense. That's what we've been
14 litigating for more than a year.

15 MR. RAYEL: The Government has to do that, Your
16 Honor, it's part of the FAR. That's -- that's part of the
17 determination that's to be made. What is the customary
18 commercial practice? The agency is required to do market
19 research to determine that. So, to say the agency can't do
20 that now is just --

21 MR. MCCALED: That's not --

22 MR. RAYEL: -- it just doesn't make any sense.

23 MR. MCCALED: That is not, Your Honor, what CGI is
24 saying. We're not saying they can't do market research.
25 What we said is you can't go do market research for the

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1 purpose of trying to establish that the terms are consistent
2 with customary practice --

3 MR. RAYEL: And, Your Honor, that is not the --

4 THE COURT: Let him finish, please, Mr. Rayel.

5 MR. RAYEL: Okay, I thought he was done, I'm sorry.

6 MR. MCCALED: That has been fully litigated,
7 adjudicated and preclusively determined.

8 THE COURT: Okay. So, let's go -- I want you to
9 file the transcript of the oral argument at the Circuit,
10 please, Mr. McCaleb, since you're relying on it.

11 MR. MCCALED: Yes, Your Honor.

12 THE COURT: What in my record suggests that this
13 case was adjudicated?

14 MR. MCCALED: Your Honor, you --

15 THE COURT: I'm just asking you to make a record,
16 Mr. McCaleb. So, tell me on the record what in my record
17 and/or in my decision suggests that this issue has been
18 determined by me. I see -- you're going to tell me what the
19 Circuit said and I see their Footnote 5. But what supports
20 that? Is there a statement by the Government on the record
21 about why they're not -- that they're not contesting this?

22 MR. MCCALED: Yes. I think, Your Honor, that the
23 section of the -- of this Court's opinion that begins on -- I
24 believe it's page 9 of the Court's decision that the modified
25 payment terms deviate from standard commercial practice, and

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1 that's based on the -- that's based on the evidence that we
2 put in, the Roth declaration, that this Court made the
3 determination that the modified payment terms deviate from
4 standard commercial practice.

5 THE COURT: Mm-hmm, okay. Okay. And the
6 Government's now going to try to undercut that finding by
7 saying that, well, we did admit that. You're not denying
8 that, right, Mr. Rayel?

9 MR. RAYEL: No, Your Honor. And I --

10 THE COURT: You admitted it. You admitted it.
11 And, therefore, because you didn't think Part 12 applied, you
12 didn't do the market research. But now that Part 12 applies,
13 you think that you cannot admit that?

14 MR. RAYEL: No, we're not -- we're not withdrawing
15 any -- first of all, we never admitted that the terms were
16 inconsistent with customary commercial practice. What the
17 Federal Circuit found correctly is that we did not dispute
18 that they were inconsistent with customary commercial
19 practice for -- and then in the footnote, they -- you know,
20 we noted in a footnote in our brief that we didn't -- we
21 didn't think the Court should make a de novo determination.

22 The terms are, in fact, inconsistent with customary
23 commercial practice and the Court -- the Federal Circuit
24 found that this issue was waived. Our waiving an issue of
25 whether it was appropriate for the trial court -- for this

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1 Court to make a de novo determination about consistency of
2 these terms with customary commercial practice. The Federal
3 Circuit found that waived. We're not disputing the Federal
4 Circuit's decision on that issue.

5 We have a whole -- a new potential hypothetical
6 issue that we're talking about here and that's if the agency
7 does --

8 THE COURT: Wait a minute, wait a minute, wait a
9 minute. Let me -- I want to focus on that still.

10 MR. RAYEL: Yes, Your Honor.

11 THE COURT: The Government, in Footnote 5, in
12 response to oral argument questions, indicated that the Court
13 of Federal Claims was without authority -- without authority
14 to find that the revised payment terms were inconsistent with
15 customary commercial practice. What the heck does that mean?
16 We deem this issue waived. So, my authority was called into
17 question?

18 MR. RAYEL: What we stated -- what we stated in a
19 footnote in our brief, Your Honor, was that -- I mean, as we
20 understood what the Court did in its opinion, it basically
21 made a de novo determination that these terms were -- based
22 upon evidence presented by CGI, that these terms are
23 inconsistent with customary commercial practice.

24 THE COURT: Ah, so, it was the Court of Federal
25 Claim made a de novo finding?

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1 MR. RAYEL: Right. And we --

2 THE COURT: And you said that was wrong.

3 MR. RAYEL: -- (inaudible) our position that it was
4 inappropriate for the Court to have made that finding that
5 that was not the issue in this case. In fact, by the Court
6 finding that Part 12 didn't apply, there was no need to make
7 that finding.

8 THE COURT: Okay.

9 MR. RAYEL: In any event, you know, the Federal
10 Circuit asked some questions about this at oral argument and
11 we -- you know, and we -- we discussed it and ultimately they
12 deemed the issue to be waived, which --

13 THE COURT: Right, right, right.

14 MR. RAYEL: -- we're not disagreeing with frankly.

15 THE COURT: Well, you're not. Okay, so, the issue
16 is this: This Court, in your view, erroneously made a
17 determination that the revised payment terms were
18 inconsistent with customary commercial practice. Erroneously
19 made that de novo finding. That was your position, right?
20 That I didn't have the authority to do that.

21 But the Federal Circuit said, by saying that you
22 waived it, oh, no, no, no, that stands, right? Isn't what
23 that footnote means? That finding of mine, that de novo
24 finding, erroneous or not, stands because you didn't
25 challenge it.

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1 MR. RAYEL: Yes, that finding stands for purposes
2 of this litigation. Whether or not it has conclusive effect
3 in another litigation is an entirely different issue.

4 THE COURT: Well, wait, wait, wait. But it has
5 effect in this litigation and, quite frankly, Mr. Rayel, all
6 I care about right now is how to frame the terms of the
7 injunction.

8 MR. RAYEL: Absolutely, Your Honor, and that's why
9 -- we're not asking you to -- we're not asking you to decide
10 collateral estoppel issues for future litigation or whether
11 or not a waiver would be appropriate or not. You know, CGI
12 has taken the position that waiver can't be appropriate. We
13 don't -- maybe it is, maybe it isn't. That's not --

14 THE COURT: Okay.

15 MR. RAYEL: That's not an issue that you need to
16 decide. What we're saying is --

17 THE COURT: Right.

18 MR. RAYEL: -- we can fix the error that the
19 Federal Circuit found, which is just to say the agency can't
20 award pursuant to these RFQs until it complies with FAR Part
21 12, whatever that happens to mean.

22 THE COURT: Well, but if my decision that the
23 Federal Circuit acknowledged is alive and well, said, okay,
24 the current revised payment terms are inconsistent with
25 customary commercial practice, don't you have to do something

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1 about that in this case in order to comply with the Federal
2 Circuit's mandate and don't I?

3 MR. RAYEL: No, Your Honor, the Court -- what
4 the -- the Court is within its authority to issue an
5 injunction that requires us to comply with Part 12. The
6 agency should then go and comply with Part 12, including
7 doing the market research determining what the customary
8 commercial practices are, and if it wants to include terms
9 that are inconsistent with customary commercial practice,
10 which it has not decided to do, it should obtain a waiver.

11 That -- I mean, but no, we don't need to over -- we
12 don't need to overturn the Court's finding in this case. I
13 mean, the Federal Circuit thought it was inconsistent, this
14 Court did, and based on the evidence in the record, we're not
15 challenging that. But now the agency is tasked with going
16 out and doing its own market research to make the
17 determinations of what is a customary commercial practice.
18 If the agency, based on that market -- I mean, if the market
19 -- it doesn't make any sense. If the market research leads
20 to the fact that their current payment terms are consistent
21 with customary commercial practice, the agency is supposed to
22 ignore that? I mean, that doesn't make any sense.

23 The agency should be allowed to do the market
24 research that it's required to do under the FAR, make the
25 determinations of what's a customary commercial practice that

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1 it's required to do under the FAR based upon that market
2 research and wherever that may -- wherever that leads, it
3 leads. The agency's not trying to justify its payment terms
4 here. It's trying to follow the FAR.

5 THE COURT: Well, you can certainly do that next
6 time, but I'm not so sure that you can do that now given the
7 posture of this litigation. But maybe we don't need to
8 really get into the thorny thicket of what's going to happen
9 later.

10 MR. RAYEL: I think that's right, Your Honor.

11 THE COURT: What would be wrong, Mr. Rayel, if I
12 were to say, based on the Federal Circuit's decision, that
13 your agency is enjoined from placing orders against the
14 existing RFQs -- and maybe you can give me a qualifier there,
15 either absent a waiver or whatever, something else. Maybe
16 that's the case.

17 MR. RAYEL: I think that's right, Your Honor, and I
18 think the appropriate qualifier is until CMS complies with
19 Part 12 of the Federal Acquisition Regulation with respect to
20 the payment terms, because that's the error that was found.
21 They didn't -- CMS did not comply with Part 12. CMS needs to
22 comply with Part 12 with respect to these payment terms.

23 THE COURT: But that just -- that just extends this
24 procurement out into eternity possibly or for a long time.

25 MR. RAYEL: How? I'm sorry, Your Honor, I'm not --

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1 I don't --

2 THE COURT: Well, you're going to do market
3 research, you're going to come back. It may -- the market
4 research may show it's consistent, it may show it's
5 inconsistent. But --

6 MR. RAYEL: That's right, Your Honor. And that's
7 what the FAR -- that's what the FAR requires.

8 THE COURT: Well, it may, it may. But the dilemma
9 that we find ourselves in now is how do we follow the
10 Circuit's decision in this case. And, certainly, the
11 injunction would say you can't place the orders under the
12 existing RFQs just as they are, unless you do something
13 without waiver.

14 Now, but I'm not sure it's appropriate, given the
15 finding that I made and the finding that the Circuit didn't
16 touch about these currently being inconsistent with
17 commercial practice, that you go get to do a redo on that
18 now.

19 MR. MCCALED: Your Honor, one point on that, if I
20 might, it's more than the Circuit didn't touch it. If you
21 look at the sentence of the Circuit's opinion that precedes
22 the footnote itself, it says we affirm these undisputed fact
23 findings.

24 THE COURT: Okay, thank you. Okay.

25 MR. MCCALED: You're welcome.

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1 THE COURT: You're right. They not only touched it
2 -- they not only said you waived it, but they affirmed it.

3 MR. RAYEL: But, Your Honor, I think we --

4 THE COURT: So, aren't we all, even you, Mr. Rayel,
5 stuck with that for going forward now?

6 MR. RAYEL: We're not stuck with that for
7 purposes --

8 THE COURT: And I just use that because I think
9 that's what you're trying to fight.

10 MR. RAYEL: Yeah, I mean, I don't want to keep
11 going, but, I mean, we said in -- we explained in our reply
12 brief the various reasons why collateral estoppel would not
13 apply in a protest if the agency made a determination,
14 hypothetically, that these terms are consistent with
15 customary commercial practice based on market research, where
16 we set forth three reasons why collateral estoppel did not
17 apply.

18 THE COURT: Well, this isn't --

19 MR. RAYEL: And the Court doesn't need to decide
20 that issue. It can simply require --

21 THE COURT: No, but I do need to decide --

22 MR. RAYEL: I'm sorry, Your Honor, go ahead.

23 THE COURT: Mr. Rayel, I do need to decide what the
24 law of this case is.

25 MR. MCCAULEB: Right.

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1 THE COURT: And forget collateral estoppel. I need
2 to figure out what the law of this case is and my injunction
3 needs to be predicated on that. And that's why I'm having
4 trouble with you trying to deviate. Honestly, I think that
5 you're what -- you're going out and doing this market
6 research would be in an effort to undo a finding that was
7 made conclusively by this Court and affirmed by the Federal
8 Circuit.

9 MR. RAYEL: The agency is not trying to undo any
10 findings. The agency is trying to comply with the law in
11 doing this market research.

12 THE COURT: Okay.

13 MR. RAYEL: It's not -- I mean, the injunction
14 shouldn't -- the injunction should not interfere with the
15 lawful discretion of the agency. Now, we can have all sorts
16 of disputes about whether or not the agency is precluded
17 from, you know, making a finding under the FAR that it's
18 required to about, you know, what is a customary commercial
19 practice. But we don't need to. The simple solution here is
20 for the Court to enjoin these RFQs until CMS complies with
21 Part 12 of the Federal Acquisition Regulation with respect to
22 the payment terms.

23 THE COURT: No, but it's the until --

24 MR. RAYEL: Because that encompasses all aspects of
25 -- that encompasses the problem that the Federal Circuit

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1 found. It actually goes a little beyond the problem since
2 they were limited -- they were more limited in, you know, the
3 regulations they've now violated. But, I mean, ultimately
4 this issue -- this case was about whether Part 12 applies to
5 these -- applies to this procurement. The Federal Circuit
6 found that it was; the agency now needs to comply with Part
7 12 with respect to these payment terms. That's all the Court
8 should order.

9 MR. MCCALED: Your Honor, can I give one brief
10 response?

11 THE COURT: Yes.

12 MR. MCCALED: I'm sorry, Your Honor. The --

13 THE COURT: No, I mean, this is helpful. I don't
14 know what I'm going to do here, keep talking.

15 MR. MCCALED: The Government here is saying --
16 keeps citing that the Court shouldn't interfere with its
17 lawful discretion. It has -- the agency and the Government
18 have no lawful discretion at all to now contest the factual
19 finding that you made and that the Federal Circuit affirmed.
20 And that's exactly what they're trying to do, which is why we
21 can't agree to the language "until the CMS complies with FAR
22 Part 12" because they've told us what they think that means.
23 They've told us that what they think that that means and what
24 it permits them to do is to go forward and to go ahead and
25 make a new finding that is precluded by law of the case, a

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1 new finding that these terms actually are, after all,
2 consistent with customary consistent practice. They have no
3 lawful discretion to make that finding. The --

4 THE COURT: Well, let's talk about this then, Mr.
5 McCaleb. The word "until" maybe is posing a problem here
6 because that's -- that's very broad. Until it complies with
7 FAR Part 12 in a manner consistent with the Federal Circuit's
8 opinion would mean that it had to acknowledge that FAR Part
9 12, their adjudication of that stands for these -- the
10 purposes of this current solicitation. Now, they can do
11 whatever they want in future solicitations and do all the
12 market research in the world, but because they waived the
13 issue here and the Circuit affirmed that what happened was
14 inconsistent with FAR Part 12, I'm having a very hard time
15 just philosophically understanding why it would be
16 appropriate to let the agency revisit their compliance with
17 Part 12 nunc pro tunc retroactively.

18 MR. MCCALED: That is the exact concern that we had
19 and why we would not -- when the Government introduced this
20 language, why we would not and could not agree to it. And,
21 so, what we tried to do was make it really simple and say,
22 look, Government, the Government's enjoined from proceeding
23 with an award of the contract under these RFQs, period.

24 And, second, that to the extent that they issue a
25 new or amended RFQ, that they'll give offerors a reasonable

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1 opportunity to respond. And that response may take the form
2 of submitting a bid, it may take the form of doing nothing
3 and it may take the form of responding via protest, which
4 would ultimately lead to, you know, the second issue that the
5 FAR Part 12 language gave us, you know, heartburn over and
6 that is the Government's now professed desire to potentially
7 issue a waiver after -- that they -- under their theory of
8 the case, they could have done at any time over the last 15
9 months and, yet, they haven't and they didn't.

10 And, now, after going through all of this
11 litigation and all of the resources that it has cost, you
12 know, now they want to craft an argument that they can waive
13 the use of the terms which is vindictive and, frankly, under
14 the facts of this case, we think is an exemplar of arbitrary
15 and capricious conduct, especially when you consider the
16 professed need that this Court found very troubling, you
17 know, the so-called belt and suspenders approach that
18 increases prices and reduces competition. We think the far
19 better solution here is just to go ahead and enjoin any award
20 under these RFQs and for any new procurement requires CMS to
21 issue new RFQs or amended RFQs and share the results of the
22 corrective action with all of the RACs and give them an
23 opportunity to decide how to respond. That's it.

24 It's really -- I don't think it's that simple -- I
25 mean, I think it's pretty simple, especially when you

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1 consider under CACI, the RFQs, as written, we believe are a
2 nullity.

3 THE COURT: Because they don't comply with
4 commercial practice.

5 MR. MCCALEB: And because they -- and as a result,
6 because they don't comply with the law, you know. Now, what
7 the Government has said is, well, we shouldn't have to
8 necessarily issue a new, you know, solicitation because you
9 only have to do that where -- and they were analogizing the
10 FAR 15.206, which requires cancellation where -- and a new
11 solicitation where the change is so substantial as to exceed
12 what a prospective offeror reasonably could have anticipated.

13 Well, what change could be more substantial than
14 one that purportedly makes an illegal solicitation legal?
15 They call that a ministerial amendment. Frankly, with all
16 due response, it's hardly an act that purports to convert an
17 illegal solicitation to a legal one can hardly be deemed and
18 called a ministerial amendment.

19 MR. RAYEL: Your Honor, what we meant by that was
20 if the agency kept the same payment terms, it wouldn't
21 substantially change any proposals. I mean, it would be the
22 exact same terms, perhaps adding it to a, quote, "addendum"
23 required by 12.302(d). I'm not sure if it qualifies right
24 now under that or not.

25 But, you know, I think the one thing we want to

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1 point out from our reply brief is that it's not like this
2 issue has never been litigated before. You know, the GAO --
3 and admittedly that's a different forum that issues
4 recommendations and not injunctions -- but here's what the
5 GAO recommended in the Smelkinson case. We recommended the
6 agency amend the RFP to remove the challenge disclosure
7 provisions and then request new proposals.

8 In the alternative, if the agency continues to
9 believe that the provisions are needed, the agency should
10 either confirm through appropriate market research that the
11 provisions are consistent with customary commercial practice
12 or obtain a waiver pursuant to FAR 12.302(c). So, the GAO in
13 this case was giving the agency the opportunity to do exactly
14 what CGI is saying the agency can't do.

15 MR. MCCALED: The obvious and plain distinction, of
16 course, is that here we have the Federal Circuit having
17 affirmed this Court's determination that the terms are not
18 consistent with customary commercial practice.

19 MR. RAYEL: But not based on any market research
20 that the agency was required to do under the FAR.

21 MR. MCCALED: Frankly, it doesn't matter --

22 MR. RAYEL: That's why this is -- that's why this
23 is a new issue. This is not the identical issue that CGI put
24 at issue in this case. It would be a new issue and I say
25 would be because we're not there. But the agency has made no

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1 such determination that these terms are consistent with
2 customary commercial practice. We have no intention of
3 arguing in this litigation that these terms are consistent
4 with customary commercial practice.

5 THE COURT: Okay.

6 MR. RAYEL: Only -- I'm sorry, Your Honor.

7 THE COURT: No, no, no, no, no, I -- go ahead and
8 finish Mr. Rayel, I apologize.

9 MR. RAYEL: This would only come up if the agency
10 did the market research. The market research showed, in the
11 agency's view, that these terms were consistent with
12 customary commercial practice. The agency made a finding
13 that they were consistent with customary commercial practice
14 and then included the terms in either a new RFQ or in an
15 amended RFQ or kept it the same if that was permissible by
16 law. And I understand CGI's argument that it's not.

17 But that's -- that's when it would come up in a
18 protest then that CGI or another bidder would file to argue
19 that the terms are, in fact, inconsistent with customary
20 commercial practice and CMS's market research was either
21 inadequate or it didn't actually show what CMS is claiming it
22 showed. But that's a totally different issue than what's
23 been litigated in this case.

24 MR. MCCALED: Your Honor --

25 THE COURT: That's exactly right. So, that's my

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1 problem.

2 MR. MCCALED: Yeah, and, Your Honor, just to close
3 the loop on this and then I'll be quiet. The issue before
4 the Court is whether those payment terms that required RACs
5 to wait three to ten times longer were consistent with the
6 customary commercial practice, you decided they were not, the
7 Federal Circuit affirmed that is what they're trying to now
8 go and examine all over, and that is the same issue. So,
9 I'll be quiet now, I'm sorry, Your Honor.

10 MR. RAYEL: And just to try to close the loop as
11 well, the agency has never examined that issue before. It's
12 an agency determination and that's what ultimately -- that's
13 what the agency ultimately needs to do under the FAR, is
14 required to do.

15 THE COURT: All right. Well, a couple of thoughts
16 here. You know, everyone probably recognizes that in
17 government contract law, the Government doesn't have to issue
18 a new RFQ.

19 MR. RAYEL: Right.

20 THE COURT: It doesn't have to. It doesn't have to
21 amend the RFQ immediately. There's no -- in fact, under the
22 terms of the injunction that the Plaintiff has provided, the
23 Defendant would provide all prospective offerors a reasonable
24 opportunity to submit an offer under any new or amended RFQ.
25 Any.

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1 MR. RAYEL: And that's why we used the word "any"
2 there because it may be that they just decide they're not
3 going to do anything. Maybe they're not going to procure the
4 services. Maybe they're going to continue to extend the
5 existing contracts.

6 THE COURT: The Government has complete discretion
7 in that scenario, if they did nothing, to go forward and do
8 your market research and have it apply to the next case,
9 right, Mr. Rayel?

10 MR. RAYEL: Yes, Your Honor.

11 THE COURT: So, what's wrong with that?

12 MR. RAYEL: My understanding -- and maybe I'm
13 misunderstanding CGI's arguments or what they think the scope
14 of the injunction is. But, I mean, it sounds like what
15 they're saying is that you cannot -- I mean, the agency could
16 go forward with new RFQs. It could also go forward with the
17 current RFQ so long as they comply with Part 12. That may
18 require an amendment, it may perhaps not. We don't need to
19 decide that right now. All the Court needs to do is enjoin
20 the agency from proceeding until it complies with Part 12
21 with respect to the payment terms.

22 THE COURT: Well, I know that's what you want.
23 That wasn't my question.

24 MR. RAYEL: Okay.

25 THE COURT: We have on the table a two-pronged

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1 proposed injunction. Enjoin the Defendant from placing
2 orders under the existing RFQs, period. Number two,
3 Defendant shall provide all prospective offerors a reasonable
4 opportunity to respond to any new or amended RFQ. So, the
5 existing ones are a no-go because of my decision and the
6 Circuit's decision. But you have the flexibility to do
7 nothing or to revise it after you do your market research.

8 MR. RAYEL: Right, Your Honor, the agency has the
9 flexibility to amend -- to amend the RFQs, potentially to
10 keep the same payment terms and then proceed with the
11 procurement. They wouldn't necessarily need to go out and
12 obtain new proposals.

13 THE COURT: Well, you'd have to --

14 MR. RAYEL: (Inaudible) that.

15 THE COURT: Well, I'm not going to bless that
16 because that's not my case.

17 MR. RAYEL: Right.

18 THE COURT: All I'm saying is the injunction that
19 is on the table, the two paragraphs I have just stated, would
20 permit the agency to go -- going forward, to comply with FAR
21 Part 12 however it deemed appropriate. But for this case,
22 there would be no orders under those existing RFQs because
23 the trial court and the Federal Circuit found that those
24 existing RFQs are inconsistent with commercial practice and
25 violate FAR Part 12.

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1 MR. RAYEL: What I understand their injunction
2 to --

3 THE COURT: No, it's not theirs. I'm saying that's
4 what I'm inclined to do. So, what's wrong with that?

5 MR. RAYEL: What I understand the proposed
6 injunction to be is that the agency can amend the RFQs, but
7 then needs to go out and provide and basically solicit new
8 offers from anyone who wants -- anyone on the schedule, at
9 least, that wants to -- wants to bid. And that's not
10 required by the FAR. If the agency amended the RFQs,
11 particularly if it kept the exact same payment terms, it
12 could simply -- it could simply seek new proposals from the
13 offerors that actually submitted quotes or it could -- it
14 could if the terms don't -- if the amendment doesn't actually
15 change anything that required new proposals, it could
16 potentially simply make the amendment, provide it to all
17 actual offerors and then go forward with an award based on
18 the proposals.

19 MR. MCCAULEB: Your Honor --

20 MR. RAYEL: Those are possibilities under the law.

21 THE COURT: Now, Mr. --

22 MR. RAYEL: And, again, you don't decide what they
23 are or aren't.

24 THE COURT: Mr. Rayel, why would the agency do
25 that? Why would they cut out the Plaintiff, who they found

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1 to have standing? That doesn't make any sense. And I'm not
2 sure the agency in this litigation could do that.

3 MR. RAYEL: If it had a rational basis for doing
4 it, it could, and I'm not -- and I don't think we need to
5 start getting into what -- you know, I can't defend the
6 rational basis of a decision that hasn't happened.

7 THE COURT: Oh, well, you're going to -- I'm giving
8 you an opportunity to give me your position as to why that
9 proposed injunction would be illegal or problematic that the
10 Defendant provide all prospective offerors a reasonable
11 opportunity to respond to any new or amended RFQ. Isn't
12 that --

13 MR. RAYEL: Because there's nothing in the FAR that
14 requires that and now it -- and the agency may potentially
15 have a rational basis for not doing that, for saying, you
16 know what, we have an RFQ, we're keeping the same payment
17 terms because of a waiver or whatever and, you know, there's
18 no reason to go out and solicit from anybody else. In fact.
19 CGI is on record as saying we can't bid under these payment
20 terms. This is commercially impracticable for us. So, it
21 doesn't make any sense to go out and seek a bid from CGI
22 under these payment terms.

23 THE COURT: Well, but --

24 MR. RAYEL: I think it would be -- and the Court
25 doesn't need to decide this today, but I think it would be

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1 perfectly rational for the agency to say, you know what,
2 since we're not actually making a substantive change to our
3 terms, we're going to go forward with the proposals that
4 we've received.

5 MR. MCCALEB: Your Honor, I think you can see why
6 we have been, as a result of similar conversations, so
7 reticent to agree to their terms. We just litigated this at
8 three different fora and prevailed. And, now, what they're
9 saying is we're trying to find everywhere possible to
10 preserve a way to not allow you to know what happened on
11 corrective action and give you an opportunity to respond to
12 what we do on corrective action.

13 Ultimately, what we want to be able to do is know
14 what they did and be able to respond. It might be through
15 the submission of a quote, it might be doing nothing or it
16 might be submission of a protest especially, you know, if
17 they -- if they now want to go the waiver route. But we --
18 it is unconscionable to think that now having litigated this
19 case and having been vindicated that the Government is trying
20 to preserve the right to say CGI -- we want to preserve the
21 right not to include CGI and apprise them of what we're doing
22 and give them an opportunity to respond.

23 THE COURT: Okay, Mr. McCaleb, let me ask you this:
24 How does this injunction strike you? Enjoin the Defendant --
25 it's basically your injunction with one added phrase. Enjoin

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1 the Defendant from placing orders against existing RFQs
2 unless it obtains a waiver. That's the additional phrase.

3 MR. MCCALED: Yeah, we would absolutely -- we would
4 not embrace that. We don't -- and I don't think that the
5 Court should be embracing that this is a situation that we
6 don't see any fact -- any situation under which they can
7 properly waive here. And I went through and tried to kind of
8 give you a flavor of that.

9 THE COURT: Yeah, but that issue wasn't litigated.
10 And waiver is compliant with FAR Part 12.

11 MR. MCCALED: What I --

12 THE COURT: Or might be or --

13 MR. MCCALED: Well, that's the point. What we
14 would want to be -- what we would want to know is, A, are
15 they waiving; B, notify us of that fact; and C, allow us an
16 opportunity to respond through protest or otherwise. But,
17 right now, there's nothing that would ultimately require them
18 to do that.

19 THE COURT: Well, okay, I could write that in.

20 MR. RAYEL: Your Honor, this is Mr. Rayel. We
21 certainly are not arguing that if the agency were to do a
22 waiver or if they were to keep the terms based upon a finding
23 that they are consistent with customary commercial practice
24 after market research, then CGI would not be able to protest
25 that decision. CGI certainly could protest that decision if

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1 they believed either of those decisions to be irrational.

2 THE COURT: Okay.

3 MR. RAYEL: But we -- what we're saying is the
4 injunction should not prevent the agency from making those
5 decisions that are consistent with FAR Part 12. I mean, what
6 I understood them basically to be saying is no waiver could
7 ever be rational.

8 THE COURT: Okay.

9 MR. RAYEL: Well, that's not this case.

10 THE COURT: Okay. Mr. Rayel, it is my conclusion
11 that the Federal Circuit decision bars me from allowing you
12 to go back and do market research and say that you comply
13 with FAR Part 12 for purposes of this litigation and this
14 procurement when that is the law of the case. That's my
15 reaction here. But I'm trying to find a way -- but I don't
16 think the Federal Circuit in its opinion or that this trial
17 court either addressed the whole notion of waiver because it
18 wasn't there, of the FAR Part 12 waiver, of the agency's
19 capability to do that.

20 And I don't know that there's any prohibition
21 against you doing that in a procurement -- in a corrective
22 action here. I don't know whether there is or not.

23 MR. MCCALED: Your Honor, that's why we crafted
24 that second part of the injunction in a way that we -- that
25 the Court doesn't have to address the propriety of waiver or

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1 not. It just says that the Defendant is going to provide all
2 prospective offerors, including CGI, a reasonable opportunity
3 to respond to any new or amended RFQs, and that's it. A
4 response. So, if they are going to -- if they're going to
5 issue a new RFQ or they're going to amend the RFQ and they're
6 going to say, hey, we are -- you know, we think that we are
7 entitled to and we are waiving, then at least we're going to
8 be notified of that and presumably given -- you know, given
9 an opportunity to review the basis of the waiver so we can
10 decide the propriety of it and how we respond.

11 THE COURT: Okay. So, Mr. Rayel back to you then,
12 given that understanding of this two-pronged injunction and
13 the Court's sense that we can't -- I can't bless your going
14 back and redoing the compliance, does that -- would that be
15 acceptable?

16 MR. RAYEL: Your Honor, first, the -- no, the
17 injunction, as written, would require the agency to allow
18 basically anybody on the schedule to submit quotes.

19 THE COURT: That's right.

20 MR. RAYEL: We're not agreeing that the agency is
21 required to do that under the law and it should be able to
22 keep its options open.

23 THE COURT: Well, wait a minute, what's the
24 prejudice to the agency to do that? Come on.

25 MR. RAYEL: I mean -- and, again, I --

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1 THE COURT: You get a lot of quotes.

2 MR. RAYEL: I don't know what the agency's going to
3 do. But we -- but it could be that the agency wants to
4 continue -- if it's going to continue with the same payment
5 terms, then it doesn't need to go out and seek new offers
6 when offerors had the opportunity to bid on those payment
7 terms. If it changes its payment terms, then perhaps that --
8 perhaps it would want to see new offers. That's what it did
9 the last time. But, you know, that's an issue that -- I
10 mean, we're getting into a lot of hypotheticals that I don't
11 believe we need to get into.

12 So, no, we don't -- we don't agree with the terms
13 as written. We're also not acceding to the idea that the
14 agency is precluded from doing market research for purposes
15 of determining what are customary commercial practices in the
16 industry with regard to payment terms. That's a requirement
17 of the FAR and we're not going to concede that that's -- that
18 that has preclusive effect in this litigation or any future
19 litigation. If CGI were to challenge that, challenge a
20 determination based on that market research of what a
21 customary commercial practice is, that would be -- that would
22 not be the identical issue that was before this Court and
23 before the Federal Circuit. That would be a different issue
24 and that issue was not actually litigated before this Court
25 by the Federal Circuit because we didn't contest it. That's

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1 what the case law -- the restatement said. So, no, we're
2 not agreeing to that.

3 THE COURT: Okay, I understand. But here's what
4 I'm going to do, Mr. Rayel. I'm going to give you an
5 opportunity to flesh this out because I -- and, you, the
6 Government. I'm going to issue a show cause order to the
7 Government to show cause as to why an injunction -- or as to
8 why the Federal Circuit's conclusion that the revised payment
9 terms were inconsistent with customary commercial practices,
10 why that finding is not the law of the case such that it
11 binds this Court in any injunction it were to fashion. In
12 particular, why that -- why your proposed injunction, which
13 would allow you to redo the FAR Part 12 compliance analysis
14 and, in effect, result in a new finding inconsistent with
15 this Court and the Federal Circuit's conclusion that the
16 revised payment terms were inconsistent with customary
17 commercial practices, why that is not barred under the law of
18 the case doctrine.

19 And we'll issue an order and we will articulate in
20 probably a little more coherent way hopefully and I'll give
21 you an opportunity to persuade the Court, Mr. Rayel. But as
22 I sit here right now, I am not buying the fact that given
23 what was litigated before me and the Federal Circuit, the
24 Government has an opportunity to undo a factual finding
25 prospectively. And why should this Court's injunction allow

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1 that to happen? Don't we have to honor this precedent and
2 abide by it in the current situation?

3 MR. RAYEL: We'll be happy to address that in a
4 brief.

5 THE COURT: All right. We'll issue the show cause
6 order shortly and give you an opportunity to respond. And I
7 know the Plaintiff -- I can sense, Mr. McCaleb, from your
8 comments that the costs of this litigation have been
9 prohibitive for you and, of course, I'll allow you to
10 respond, but I'm not going to -- I'll make it optional.

11 MR. MCCALED: Thank you, Your Honor.

12 MR. RAYEL: Your Honor, what date would we respond
13 by?

14 THE COURT: Well, typically, when I do a show cause
15 order, I give you ten days.

16 MR. RAYEL: Okay, that's fine.

17 THE COURT: But, you know, I haven't issued it yet.

18 MR. RAYEL: That's fine. Ten days would be -- the
19 11th would be fine with us.

20 THE COURT: Okay. Well, I'm not sure it's going to
21 get out today given what else is on our plate, but we'll try.

22 MR. RAYEL: The 14th would be fine, too, Your
23 Honor.

24 THE COURT: Okay. Anything further?

25 MR. MCCALED: The only thing I had, Your Honor, is

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1 you had asked me to send you the transcript, which isn't --
2 of the Federal Circuit argument. It's not actually reduced
3 to a paper transcript. What we can do, if it would be okay,
4 is give you the minute cites to where in the audios you can
5 find the quote that I gave you.

6 THE COURT: Okay, yeah, we have the capacity to
7 listen to the argument, and that will be fine.

8 MR. MCCALED: Okay, thank you, Your Honor.

9 THE COURT: Anything further?

10 MR. MCCALED: Not for CGI, Your Honor.

11 MR. RAYEL: No, Your Honor.

12 THE COURT: Okay, thank you, all.

13 MR. MCCALED: Thank you.

14 THE COURT: Bye-bye.

15 MR. MCCALED: All right.

16 (Whereupon, at 12:01 p.m., the hearing was
17 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, Elizabeth M. Farrell, court-approved
4 transcriber, certify that the foregoing is a correct
5 transcript from the official electronic sound recording of
6 the proceedings in the above-titled matter.

7

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10 DATE: 5/4/2015

s/ Elizabeth M. Farrell

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ELIZABETH M. FARRELL, CERT

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